PUBLIC PROSECUTOR

v.

FORSTER FRANK EDALD HEINRICH

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL TRIAL NO. 58-9-84]
21 JANUARY 1987

CRIMINAL LAW AND PROCEDURE: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trial within a trial - Affidavit evidence - Witness on foreign law - Evidence Act - Section 45 - Defence story - Whether reasonably and probably true - Whether accused should be acquitted and discharged.*

At 1.15 a.m. on 20 November 1983 a police party raided the Swiss hotel in Chulia Street. Penang. At Room 48 there were 3 Germans. The door was opened after about 1 or 2 minutes. The accused was arrested as some drugs were found in or on his travelling bag. His two travelling companions went off scot free. The accused was prosecuted upon a charge of trafficking, on his own behalf, in a dangerous drug, to wit, 239.7 grammes of cannabis resin, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952.

Held:

[1] A trial within a trial was held to determine the reply of the accused to Inspector Bhupinder Singh's question as to the contents of the 3 condoms. The statement was inadmissible because:

the interpreter might have omitted words from the statutory form of caution; and

there was inducement in the form that if the accused made a statement he will be deported.

[2] The affidavit evidence was admitted on the following grounds:

(i) Affidavit evidence of living persons is covered under the section;

(ii) The statements were such which could not be procured without an amount of delay or expense;

(iii) The contents of the affidavits were such that if true would expose the deponents or would have exposed them to criminal prosecution "at **any** time".

[3] The evidence given by the foreign German lawyer was admissible under s. 45 of the Evidence Act as he was considered competent under the Act.

[4] Upon the evidence adduced, it was possible that the drugs had been planted in the travelling bag of the accused by either or both of his travelling companions.

[Accused acquitted and discharged.]

Cases referred to:

Noor Mohammed v. The King [1949] AC 82
Selvadurai v. Public Prosecutor [1948-49] MLJ Supp 43
Poon Heong v. Public Prosecutor [1949] MLJ 114
Haw Tua Tau v. Public Prosecutor [1981] CLJ (Rep) 11
Ragunathan v. Public Prosecutor [1982] 1 MLJ 139
Marneedi v. Masimukula [1949] AIR Mad 689
Khadim Hussian & Ors. v. The Crown [1950] AIR Lah 34
PP v. Yuvaraj [1969] 2 MLJ 89
Muniandy v. Public Prosecutor [1966] 1 MLJ 257

Legislation referred to:
Criminal Code [Germany], s. 6(5)
Criminal Procedure Code, s. 424(i)(d)
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), 37(d), (da)
Evidence Act 1950, ss. 32(c), 32, 45

For the public prosecutor - Mohamed Bazain bin Idris, DPP
For the accused - R. Rajasingam; M/s. R. Rajasingam & Co.
For the West German Embassy (Watching Brief) - Sri Ram; M/s. Ram, Rais & Yap

JUDGMENT

Edgar Joseph Jr J:

According to the evidence led by the prosecution, at about 1.15 a.m. on 20 November 1983, Inspector Bhupinder Singh (PW2), area inspector, Georgetown, together with his subordinate officer, Corporal Yusoff (PW4), as a result of information received, conducted a raid on the Swiss hotel in Chulia Street, a low budget type hotel, popular with foreigners, especially Europeans. Accompanied by Corporal Yusoff and the hotel caretaker, Yu Ah Poi (PW6), he entered and checked three rooms; all on the same floor and close to each other, beginning with room 44, next room 46 and, finally, room 48, whose occupants then were three men, all German tourists, one of whom, who incidentally was the youngest of the trio, being the accused, a 21 year old bank clerk. It was the events in this room, which I shall, for the moment, mention only very briefly, but which I shall delve into more fully later, which led to the arrest of the accused alone and his prosecution upon a charge of trafficking, on his own behalf, in a dangerous drug, to wit, 239.7 grammes of cannabis resin, popularly known as hashish, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act").

I must, at this point, interpolate, to mention that if and when necessary to refer to the two other occupants of room 48 by name, I shall do so by their initials - JE and JR - as I had, during the trial, withheld publication of their names in the press.

Now, Inspector Bhupinder Singh had testified that on arrival at room 48, he knocked the door. Somebody from inside asked: "What? what?" whereupon, he replied "police checking". The light in the room went on and, according to Corporal Yusoff, about one to two minutes later, the door of the room which, until then, was still locked, was opened, apparently by the accused, as it was he who was standing near the door inside the room at that moment.

On entering the room, Inspector Bhupinder Singh saw two other male Caucasians seated on a bed. He identified himself to all three, and said he wished to check them and their belongings which were then lying scattered. He next told them to separate their belongings which they did. Both officers then began checking the luggage; there were three large travelling bags, two of which were checked by Corporal Yusoff and the third bag which belonged to the accused was checked by Inspector Bhupinder Singh. While Corporal Yusoff was checking one of the other two bags, Inspector Bhupinder Singh claimed that he recovered a sling bag (P3) from inside the side zip pocket of the travelling bag belonging to the accused, which incidentally, was returned by the police to a representative of the local German consul, a few days later and which the prosecution made no attempt to produce. Inspector Bhupinder Singh further claimed that from inside the sling bag he recovered a pink plastic bag (P4) in which were three condoms, each of which contained a black substance, (P5A to C) later certified by the chemist, Mr. Chan Kee Bian (PW1), to be a dangerous drug within the meaning of s. 2 of the Act, to wit, 239.7 grammes of cannabis resin. Inspector Bhupinder Singh said that he also recovered, from inside the sling bag, a passport and three air tickets, all belonging to the accused.

Inspector Bhupinder Singh then proceeded to question the accused as to the contents of the three condoms and received a certain reply from the accused. However, at the conclusion of a trial within a trial to determine the admissibility of this reply, I ruled that it was inadmissible, no caution having been administered; alternatively, that even if it were technically admissible, in the exercise of my discretion in accordance with the principles enunciated in *Noor Mohammed v. The King* [1949] AC 82, I ruled that I would disregard it on the ground that there was a risk of a misunderstanding arising from language difficulties so that the probative value of such reply, or indeed any subsequent replies to further questions, would be outweighed by its prejudicial effect. I shall, if necessary, give detailed reasons in writing, in the form of a formal ruling, for my conclusions as regards this part of the case.

Thereafter, Inspector Bhupinder Singh took the accused (but not his two companions) and the exhibits mentioned, to police headquarters, Georgetown. I would add, that curiously, these two gentlemen were not only not arrested but were not even interviewed by the police. Indeed, they were allowed to get away scot free - the hotel register suggesting that they had checked out at 1 p.m. the next day - but, to be fair to Inspector Bhupinder Singh, nothing incriminating had been recovered from their luggage. The importance of these facts will become apparent when I come to consider the case for the defence.

At the police station, the accused was interviewed and a statement recorded from him by woman Inspector Annie Wong (PW7). On this occasion, the police had the services of a German interpreter in the person of a Mrs. Klose (PW8), then serving as secretary to the German consul who was attached to a German surgical company called Aesculap Surgical Industries Sendirian Berhad.

Again, upon objection being taken to the admissibility of the statement, I had directed a trial within a trial, in the course of which, Mrs. Klose was called as a witness for the prosecution and said, *inter alia*, (a) that she could not recall whether in interpreting the caution she had used words similar to the statutory form of the caution or if she had omitted any word from it and (b) that the accused had told her, at the time, that he wished to give a statement because he was under the impression that he would be deported if he did so. She added that the accused had told her that he had been twice told by police officers that if he made a statement he would be deported. She had not, however, conveyed this to woman Inspector Annie Wong.

I need hardly say that if it appears to the Court that words such as these were addressed to the accused by persons in authority, then, that would be sufficient to deprive the statement of its voluntary character, as very slight inducement will suffice for this purpose: per Callow J *in Selvadurai v. Public Prosecutor* [1948-49] MLJ Supp 43.

Although the prosecution then sought for, and obtained leave, to call evidence in rebuttal of point (b) but not, of course, point (a), I ruled that the statement was inadmissible on both grounds (a) and (b). I shall, if necessary, give formal grounds in writing for this ruling but, it is sufficient, if at this stage, I say that once Mrs. Klose admitted that she may have omitted words from the statutory form of caution, the prosecution had failed to prove its administration in full to the accused and, on this ground alone, the statement was inadmissible in law: see *Poon Heong v. Public Prosecutor* [1949] MLJ 114.

As regards the second point, the accused gave evidence that on two separate occasions he had been told by police officers that if he made a statement he would be deported. This was supported, though not corroborated, by Mrs. Klose's testimony, to which I have already referred. Although the prosecution had attempted to disprove this allegation by calling a

number of police personnel with a view to showing that this could not have happened, at the end of the day, I entertained a reasonable doubt as to the accused's allegation because I believed Mrs. Klose. She was, after all, a witness for the prosecution and although being a German national herself it would have been natuaral for her human sympathies to be for the accused, the fact remained that she was not discredited and she made a favourable impression upon me in the witness box.

Upon the above evidence, I was satisfied, having regard to the principles enunciated in the Singapore Privy Council case of *Haw Tua Tau v. Public Prosecutor* [1981] CLJ (Rep) 11 referred to with approval in *Ragunathan v. Public Prosecutor* [1982] 1 MLJ 139 and the presumptions under s. 37(d) and s. 37(da) of the Act, that the prosecution had established a *prima facie* case which, if unrebutted, would warrant a conviction and, I accordingly, called upon the accused to enter upon his defence.

The accused elected to give evidence upon oath. He mentioned his travels with his two companions from Germany through India and Sri Lanka to Malaysia.

He recalled how, at about 1.00 a.m. on the day in question, he was lying in bed and, about to go to sleep, when he heard a knock on the door. His two companions were also in the room. Then he thought he heard a voice say something to this effect: "service" or "room service". He replied saying "was" which is the German equivalent of "what"? After that, there was a stronger knock on the door and a voice saying "police checking". On hearing this, he got up from bed, turned the light on, went up to the door and opened it.

A man with a turban, identified as Inspector Bhupinder Singh, was seen to stand at the door; with him were two other men. One of these two other men, he said, could have been Corporal Yusoff and the other was the caretaker, Yu Ah Poi.

He thought that Inspector Bhupinder Singh then said "police checking". At that point, all three entered the room.

Corporal Yusoff then began checking the bags of his two companions while Inspector Bhupinder Singh went up to check his travelling bag which lay on a chair. Shown by his Counsel the photograph (Exh. P11B), he said that it was most probably a picture of the bag. He added, that at that time, his bag was covered with a towel. He had no recollection as to who had placed the towel there. Inspector Bhupinder Singh removed the towel and underneath it was a pink plastic bag which he identified as P4. Inspector Bhupinder Singh then picked the plastic bag and asked the accused if the travelling bag belonged to him. He also asked the accused if the plastic bag was his. In view of my ruling at the conclusion of the trial within a trial hereinbefore mentioned, I do not propose to say anything more about what passed between the accused and Inspector Bhupinder Singh.

Inspector Bhupinder Singh then picked up the sling bag which was also lying under the towel on top of the accused's travelling bag, took out from it the accused's passport, examined it and then asked the accused to follow him.

At this point, according to the accused, one of his companions- he thought it was JE - said to him in German "Shut up. There are some drugs in the plastic bag. But don't worry we will help you. Do not implicate the two of us in this." The accused said be believed this.

He maintained that although the sling bag belonged to him, the plastic bag did not. He added that before JE had said this he had not seen the plastic bag and its contents and had not known of their existence.

He added that he did not know if either or both his companions had the three condoms before the raid by Inspector Bhupinder Singh. He had no inkling of his companions having or carrying drugs.

Under cross-examination, he said, his companions were not his close friends. He had known JE for 8 to 9 years and his other companion, JR, since 1981. However, he said JR was not exactly his friend; he had got to know him through JE.

Explaining how he came to accompany his two companions on their travels to Malaysia, he said that the trip had been planned by JE, JR and another friend. But, as this other friend could not make it, the accused was asked to step into the breach which he did.

He admitted that during their travels through India, Nepal and Sri Lanka, the locals there had approached him, offering to sell drugs.

He further admitted that his two companions had during their travels through India and Nepal and, probably, Sri Lanka, been smoking what he suspected to be drugs because of the strong smell. "Yes" he said that he once joined in and had a smoke but felt awfully ill and vomitted. His companions told him it was some kind of drug. He added, in answer to a question, that he was induced to smoke this out of curiosity when he saw his companions smoking quite a number of times.

He stressed, however, that he had never seen the plastic bag and its contents, being the three condoms, until Inspector Bhupinder Singh showed them to him in the Swiss hotel.

Turning to the events of the night of 19 November 1983, he recalled that it was rather late when he and his companions got back to the hotel. As he was very tired, he went straight to bed. However, his companions did not go to bed at the same time.

He knew that it was an offence to be in possession of drugs.

When asked if he was suggesting that his companions had placed the drugs in his travelling bag under a towel he replied that he did not see them do it but, according to what JE had said - this must have been the case.

Recalling the events in the room when he got up from bed to open the door in response to the knock, he said the room was dark though he could not say if it was pitch dark. He confirmed that he was sleeping in the bed nearest the door and his travelling bag was on a chair not far from the door. He added that he could not recall if, at this point of time, his companions were in bed or standing up.

He categorically denied having placed the plastic bag and contents on top of the travelling bag under the towel.

He agreed that when he was led away by Inspector Bhupinder Singh to the police station, he had agreed not to implicate his two companions. He believed that his companions would help him and he was not then aware of the seriousness of the offence.

He maintained that he had never handled the three condoms.

The defence then sought to use two affidavits affirmed to by the two companions of the accused and attested in the manner required by s. 424(i)(d) of the Criminal Procedure Code. Their admission was sought, under s. 32(c) of the Evidence Act (Revised 1971), which, so far as material to the circumstances of this case, provides:

> Statements, written or verbal, or relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:

(c) When the statement ... if true, would expose him or would have exposed him to a criminal prosecution ...

The first question which arose for decision, as regards this part of the case, was whether the affidavit of a living person could come within the ambit and meaning of the word "statement" under s. 32. I was satisfied that it could provided that it complied with the conditions laid down in the section: See *Marneedi v. Masimukula* [1949] AIR Mad 689.

The second question which arose for decision was whether the statements were of persons whose attendance could not be procured without an amount of delay or expense which under the circumstances appears to the Court to be unreasonable.

It was common ground that the persons concerned were abroad so that it was impossible to compel their attendance because the process of this Court is of no force outside the jurisdiction and the defence who desire their presence are thus helpless. In any event, the accused was by the time of his trial an ex bank clerk and had been in custody since the date of his arrest for little more than three years. He testified that he did not have the resources to procure their attendance in Court. It was suggested by the learned Deputy and I should infer from the fact that the accused was able to procure the services of Counsel to represent him at the trial, that he had the necessary resources. I do not consider that it would be right or fair for me to draw such an inference. The accused testified, under cross-examination, that members of his family paid the legal fees. That may well have been a long time ago and there was no evidence as to what those fees amounted to: it might have been a token fee.

I am satisfied that assuming, for one moment, the two persons concerned were prepared to attend Court and to testify for the defence, their presence could not have been procured without an inordinate amount of delay and expense such as would have been unreasonable under the circumstances of the case: see *Khadim Hussain & Ors. v. The Crown* [1950] AIR Lah 34, 37 para 13 col 2.

The third question which arose for decision was whether the contents of affidavits were such as, if true, would expose the deponents or would have exposed them to a criminal prosecution. I take this requirement to be a prosecution in this country.

In considering this latter question, the Court has to be satisfied that the conditions of the sub-section were fulfilled **at the time** when the statement was made before it can admit the same; were it otherwise, the influence for trustworthiness would not operate.

Now, the word 'expose' considered in isolation is not susceptible of exact definition especially where, as here, it is used in a metaphorical sense. Clearly, its meaning must depend upon the context in which it is used.

In my judgment, for the present purpose, it is enough if the statement, assuming it to be true, amounts to a confession, for it would then expose its maker, that is to say, subject him to the risk of prosecution. Exposure to the risk of prosecution - not, be it noted, to conviction - at any time while the maker is living, would be sufficient.

In the present case, the deponents were in West Germany at the time they affirmed their affidavits and are still there. I was told by the learned Deputy from the Bar, and I take it to be correct, that no extradition treaty exists as between this country and West Germany.

The risk of prosecution would therefore be not in the least probable but, of course, possible if, say the deponents should be foolish enough to return to this country or - and this is more likely - if they should go to a country with which this country has an extradition treaty.

The subsection makes no distinction as to the degrees of risk of prosecution and, I fail to see how. I can take that into account for, to do so, would be to make an unauthorized amendment to a statutory provision. It is enough, as I have said, if the contents of the statement would expose the maker to prosecution at any time while he is living.

Having perused the affidavits, I was satisfied that they complied with the conditions laid down in the sub-section and I accordingly admitted them in evidence. They were then marked as exhibits D19 and D20.

However, in considering what weight should be accorded to these affidavits, I warned myself, that although the makers were under oath and by the laws of the Federal Republic of Germany, not only is perjury a serious offence punishable with imprisonment of from one to fifteen years, but that the Courts of that country have extra-territorial jurisdiction to try its citizens for drug offence even though committed abroad, by virtue of s. 6(5) of the German Criminal Code of 15 May 1871, nevertheless, their testimony was not tested by cross-examination and I had no opportunity of observing them.

I would add that evidence as regards German law on these matter was given by Mr. Peter Rawert (DW1), a pupil reading in the chambers of a German legal firm, Messrs. Thummel Schutz and partners, with offices at 9 Battery Road, Singapore. He holds the degree of LL.M (Exeter University) and a degree awarded by the Court of Appeal in West Germany, equivalent to an English LL.B. He had earlier been attached to the office of the Public Prosecutor in West Germany for a period of four months. His work then involved representing; the Public Prosecutor in Court and the drafting of charges. I was satisfied as to his competence to testify as to foreign law and I admitted his evidence under s. 45 of the Evidence Act 1974. I had no hesitation in accepting his evidence on these points. I also accepted his formal evidence as to the receipt of the affidavits, D19 and D20, from Germany, on 14 January 1987 at Subang airport, which he did, upon the instructions of the solicitor for the accused.

It was also clearly established that the deponents of the affidavits, D19 and D20, were indeed the two travelling companions of the accused who were present in room 48 with him at the time of the police raid. Not only did the accused give evidence identifying their signatures on the affidavits but there was also evidence of their passport numbers appearing therein which matched those appearing in the hotel register.

In these circumstances, I gave leave to Counsel to read the affidavits. In a nutshell, these affidavits wholly absolved the accused from all liability as regards the dugs, the subject matter of the charge. The deponents affirmed that they alone bought the hashish, smoked it and carried it.

In his affidavit, D19, affirmed to on 13 January 1987, JR referred to the events in room 48 shortly before and at the time the police struck in these terms:

> As we almost always did on the trip, - (JE), Frank and I shared a room in the Swiss Hotel in Penang. There - (JE) and I smoked some of the hashish we had bought.
>
> As we intended to leave the hotel on the following morning 20 November1983 the hashish from which - (JE) and I had taken what we had smoked, remained lying on the table of the hotel room. We did this so that we wouldn't forget it when we left the next morning and we intended to hide it then.
>
> -(JE) and I had kept the hashish in the toilet cistern during our stay in room 48 of the Swiss Hotel.
>
> At about 1.00 in the morning of 20 November 1983 there was a loud knock on the door of our room and Frank Forester went to the door to open it. As he was about to open the door, Frank Forester asked in German what the person who had knocked wanted. At that moment we heard someone in the corridor say "Police".

-(JE) and I immediately thought of the hashish lying on the table, dashed to it and threw the hashish into the nearest travelling bag which we covered with a hand towel. At that moment, -(JE) and I were in such a panic as Frank Forester was just opening the door, that we didn't even realise whose travelling bag it was lying on the chair next to the table.

In his affidavit, D20, JE affirmed much the same thing.

Now, the onus which lies upon the prosecution is to prove that its case is true whilst, that on the defence, is merely to offer an explanation which **might** reasonably and probably be true: see *PP v. Yuvaraj* [1969] 2 MLJ 89.

Upon the evidence adduced before me, the question of critical substance which arises for decision is whether the 239.7 grammes of cannabis resin or hashish, the subject matter of the charge, might have been planted in the travelling bag of the accused without attracting his attention as contended by the defence?

Before I proceed to an examination of the evidence relevant to this question, I must mention that there was, as can readily be seen, an acute conflict of evidence as to the exact place from which the hashish contained in the three condoms was recovered.

To recapitulate, according to the prosecution, the three condoms in the plastic bag, along with the passport and air tickets of the accused, were recovered from the sling bag, which, in turn, was recovered from a side zip pocket of his travelling bag. However, the defence version was that the condoms in the plastic bag were recovered, not from the sling bag, but from the top of the accused's travelling bag, they being hidden from view by a towel.

I now propose to evaluate the evidence of Inspector Bhupinder Singh, Corporal Yusoff and Yu Ah Poi, relative to this issue.

There is a preliminary observation which I wish to make regarding the testimony of Inspector Bhupinder Singh. He had admitted that his conduct in not detaining or at least interviewing and recording statements from the two companions of the accused was called in question by his superior and though he added that his explanation for these omissions was accepted, the fact remains that it would be natural for him to absolve them, if necessary, at the expense of the accused. However, I mention this only in passing, as I do not propose to place undue stress on it.

Turning to specific matters, according to Inspector Bhupinder Singh, he recovered the sling bag from inside the side zip pocket of the travelling bag of the accused. On examining the contents of the sling bag, he found in it a plastic bag in which were three air tickets all bearing the name of the accused.

However, a little later, in examination-in-chief, he had also said, that when he first saw the sling bag it was in the same position as it appears in the photograph, P11B. This picture, taken by the police, shows the sling bag **not** in the side zip pocket of the travelling bag but in its main compartment which incidentally, was wide open, right on top of other articles and plainly visible. This makes me suspicious of his evidence that he in fact recovered the three condoms from the sling bag. In these circumstances, I regret, I cannot accept his evidence on this point.

As for Corporal Yusoff, he too gave conflicting evidence on the same point; for example, he first said, in examination-in-chief, that he saw Inspector Bhupinder Singh taking the sling bag from the pocket of the travelling bag but, later, in cross- examination, he said, that when he first saw it, Inspector Bhupinder Singh was already holding it. He added that he did not see Inspector Bhupinder Singh take it out of the travelling bag. However, he did say that he

saw Inspector Bhupinder Singh take out the three condoms from the sling bag but he admitted that he was still checking another bag when he saw this. When asked as to how he could do this he said: "Yes, I had one eye on the bag I was checking and the other on the bag Inspector Bhupinder Singh was checking - **at the same time."**

Even allowing for the fact that Inspector Bhupinder Singh and Corporal Yusoff were then facing each other, I consider that for anyone, this was virtually an impossible performance since, it is well known, that human vision is binocular. I would add that it is my considered opinion that as Corporal Yusoff was then checking another bag, he had no particular reason to be observing what Inspector Bhupinder Singh was doing and, even if he had, I view with considerable skepticism and, indeed I do not believe him, when he claimed that he could do so in the manner aforesaid.

Corporal Yusoff's evidence, on this point, was therefore of no assistance to the prosecution.

As to the caretaker, Yu Ah Poi, he testified that he did not accompany Inspector Bhupinder Singh and Corporal Yusoff into the accused's room but stood at its door inside it. At first, he claimed that he saw Inspector Bhupinder Singh take the sling bag from the travelling bag. He also claimed that he saw Bhupinder Singh take out from the sling bag, the plastic bag and its contents which he described as something "black and long". He added "there was more than one such object".

Under cross-examination, the witness first said, he did not know from which portion of the travelling bag Inspector Bhupinder Singh recovered the sling bag but, in his very next sentence, he said "Now I say PW2 recovered P3 from the main compartment ... but I can't say if P3 was on the top or at the bottom of the bag" Then, he added, "I can't remember if there was a towel lying on top of the bag before Inspector Bhupinder Singh began searching it."

Cross-examination then turned on the question whether the witness actually saw from where Inspector Bhupinder Singh recovered the condoms. When it was put to the witness that the plastic bag and its contents, being the three condoms, did not come from the sling bag, he replied - if I may say so, without much confidence "I say it did". And then, when Counsel put it to him that the plastic bag and its contents were recovered from the top of the travelling bag, the witness made the somewhat startling admission "**When I first saw P4 and its contents they were already in Inspector Bhupinder Singh's hands, so I did not see from where he recovered them**."

I, therefore, unhesitatingly reject Yu Ah Poi's evidence that he saw Inspector Bhupinder Singh recover the plastic bag with its contents, being the three condoms, containing the hashish from the sling bag.

In these circumstances, I am left with the version of the accused that the plastic bag containing the three condoms was recovered by Inspector Bhupinder Singh **not** from the sling bag but from the top of his travelling bag under a towel. The accused withstood the rigours of lengthy cross-examination, as regards this part of the case, as indeed he did with regard to the remaining issues in the case. I find nothing improbable in his evidence and I accept his evidence as to the place from where the offending exhibits were recovered.

Once it is accepted that the offending exhibits (which undoubtedly were in the plastic bag) came **not** from the sling bag but from the main compartment of the travelling bag belonging to the accused, under a towel, the prosecution case loses much of its sting and the next question which arises is who put them there. The accused has denied that he did; he has

gone further and denied knowledge of their existence until Inspector Bhupinder Singh showed them to him in the hotel room. There are the affidavits of his two companions confirming these crucial factors.

Credibility is a matter of elusive variety and it is therefore necessary to probe the matter further. I have already said that I thought that the accused stood up well to cross-examination; but as HT Ong FJ (as he then was) said in *Muniandy v. Public Prosecutor* [1966] 1 MLJ 257 - the fact of being unshaken in cross-examination is not *per se* an all sufficient acid test of credibility; the inherent probability or improbability of a fact in issue being the prime consideration.

Then again, the look of the accused, his manner and his demeanour; as he testified, particularly under cross-examination, his doubts, his variations of language, his hesitation, were, I thought, consistent with innocence. But, I bore in mind, what the sages of the law have said, time and again, namely, that demeanour alone, is not a touchstone of truth.

There are, however, certain features in the evidence led by the prosecution which lend intrinsic plausibility to the testimony of the accused. I would state them thus:

In the first place, if as alleged by the prosecution that the accused was the possessor of the offending exhibits, why did he not upon hearing the knock on the door to his room accompanied by the all important words "police checking" dispose of them by, for example, throwing them out of the window, which had no less than six appertures large enough for a hand to go through, or stuff them into the air vents above the window, or deposit them in the cistern of the toilet attached to his room. He had ample time to take such steps because Corporal Yusoff had himself testified that there was an interval of **one to two** minutes between the knock on the door accompanied by the words "police checking" - uttered twice - by Inspector Bhupinder Singh and the caretaker. I would add that for a moment better appreciation of the evidence, I visited the *locus in quo* in the company of the accused, the learned Deputy, learned Counsel, Inspector Bhupinder Singh and the caretaker. As a matter of fact, I spent more then one hour in room 48, to study its permanent features (which, according to the caretaker, had not changed since the date of incident) and to give both the prosecution and the defence the opportunity of pointing out anything they thought was of significance.

Reverting to the matter under discussion, the prosecution would have us believe that the accused, although he was the possessor of the drugs, obligingly left them in his sling bag, which also contained his passport and airline tickets, in the side zip pocket of his travelling bag and then, himself, opened the door to let the police in. Of course, that is possible, but not in the least probable and I unhesitatingly dismiss the suggestion.

In the second place, there is no dispute, that when the police struck, there were the two other occupants in the room with the accused. Neither was arrested nor held for questioning or even interviewed and statements recorded from them. Had these elementary steps been taken they might have been jointly tried with the accused or they might have been called as witnesses for the prosecution.

A feeble attempt was, however, made by the investigating officer, Inspector Karim, to get in touch with them. He did this, later the same day, when he came to have pictures taken of room 48 and, not finding the occupants there, left a message with the caretaker, to request them to get in touch with him. The latter duly conveyed the message but, perhaps understandably, neither complied.

The investigation suffered from at least two other defects. First, it does not appear that finger nail clippings or hand swabs were taken from the trio in room 48, with a view to ascertaining, if they, or any of them, showed traces of hashish. Secondly, it seems apparent, that no attempt was made to check the condoms for fingerprints although their surfaces were taut and smooth, loaded as they were, with the hashish.

There is one other point upon which I must make a finding and it is this: Inspector Bhupinder Singh had said that during his presence in the room, the three occupants did not speak to each other. Corporal Yusoff did not give any evidence on this point. However, the caretaker had said that "during the checking, none of the occupants spoke to each other" - this statement may carry with it the implication that they did speak to each other **after** the checking. The accused had, as I have said, testified that after the checking, as he was being led away by Inspector Bhupinder Singh, JE did warn him to shut up as there were drugs in the plastic bag but he was not to worry as they would help him. However, he was not to implicate him and the other companion.

Under cross-examination, the accused said that when JE spoke to him, they were close to each other and so there was no necessity to speak in a loud voice. He did not accuse Inspector Bhupinder Singh of having lied on this point but suggested that perhaps the officer might not have overheard what JE had said.

Having regard to the fact that not many words were alleged to have been spoken and, perhaps, softly, in a foreign language, some three years ago in the supercharged atmosphere of room 48, I can find nothing improbable in the evidence of the accused on this point and I therefore accept it.

I said earlier on in this judgment that the question of critical substance which arises for decision in this case is whether the 239.7 grammes of cannabis resin or hashish might have been planted in the travelling bag of the accused by either or both his travelling companions without attracting his attention. I am not concerned with suspicion however grave or theories however ingenious. But, having regard to the fact that the light in this small room was not on at the material time and it, therefore, must have been dark, especially if the curtains were drawn shut, and the further fact, that it was the accused who went up to the door to open it and let the police in, some one or two minutes later - his two companions being then behind him - I can see no difficulty in either or both of them in a fit of panic brought about by the words "police checking" - planting the offending exhibits in the travelling bag of the accused without attracting his attention.

I therefore accept the explanation of the accused that he never placed the offending exhibits in his bag and also that he had no knowledge of their existence until they were shown to him by Inspector Bhupinder Singh. The presumptions under ss. 37(d) and (da) of the Act are therefore rebutted and the accused is entitled to an acquittal.

I would stress that I have arrived at this conclusion, even without the affidavits, D19 and D20. With these affidavits, which I accept as being reasonably probable, having regard to my findings of fact aforesaid, the case for the defence becomes overwhelming and convincing and more than sufficient to rebut the presumptions.

In all the circumstances, I am thoroughly convinced that the accused is entitled to a verdict of not guilty and I accordingly acquit and discharge him.

Also found at [1987] 2 CLJ 177